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7  
8 Of Attorney for Plaintiffs  
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10  
11 UNITED STATES DISTRICT COURT

12  
13 DISTRICT OF OREGON  
14

**HEREDITARY CHIEF WILBUR  
SLOCKISH, a resident of Washington,  
individually and as Hereditary Chief of  
the Klickitat/Cascade Tribe,**

**THE KLIICKITAT/CASCADE TRIBE, a  
confederated tribe of the Yakama Indian  
Nation,**

**CHIEF JOHNNY JACKSON, a resident  
of Washington, individually and as Chief  
of the Cascade Tribe,**

**THE CASCADE TRIBE, a confederated  
tribe of the Yakama Indian Nation,**

**CAROL LOGAN, a resident of Oregon,**

**CASCADE GEOGRAPHIC SOCIETY, an  
Oregon nonprofit corporation,**

**and**

**MOUNT HOOD SACRED LANDS  
PRESERVATION ALLIANCE, an  
unincorporated nonprofit association,**

**Plaintiffs,**

Case No.

**CV '08-1169- ST**

**COMPLAINT**

**SUIT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF  
AND DAMAGES**

#2336

**v.**

**MARY E. PETERS, Individually and as  
U.S. Transportation Secretary,**

**UNITED STATES DEPARTMENT OF  
TRANSPORTATION, FEDERAL  
HIGHWAY ADMINISTRATION, an  
Agency of the Federal Government,**

**DIRK KEMPTHORNE, Individually and  
as U.S. Interior Secretary,**

**UNITED STATES DEPARTMENT OF  
INTERIOR, BUREAU OF LAND  
MANAGEMENT, an Agency of the  
Federal Government,**

**JOHN FOWLER, Individually and as  
Executive Director of the Advisory  
Council on Historic Preservation,**

**ADVISORY COUNCIL ON HISTORIC  
PRESERVATION, an Agency of the  
Federal Government,**

**and**

**MATTHEW GARRET, Individually, and  
as Director of the OREGON  
DEPARTMENT OF  
TRANSPORTATION, an Agency of the  
State of Oregon,**

**Defendants.**

**Plaintiffs allege:**

## **INTRODUCTION**

**1.**



1 Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4). This  
2 action is brought pursuant to 5 U.S.C. §§701-706; 16 U.S.C. §§ 470(f) and 470w-4; 42  
3 U.S.C. §§ 1983 and 1988 and the Fifth and Fourteenth Amendments to the Constitution  
4 of the United States.

## 5 VENUE

### 6 3.

7 Venue of this court is invoked pursuant to 28 U.S.C. § 1391(b). A substantial  
8 portion of the events giving rise to the claims occurred within this Division of Oregon, as  
9 alleged below. The segment of U.S. Highway 26 from the Salmon River Bridge to East  
10 Lolo Pass Road, and the cultural, historic, and archaeological resources impacted by the  
11 highway widening project, are all located within unincorporated Clackamas County,  
12 Oregon. The Defendants made the decisions to approve the highway widening project, for  
13 the most part, in Salem, Oregon, and the metropolitan area of Portland, Oregon.

## 14 PARTIES AND STANDING

### 15 4.

16 Plaintiff Wilbur Slockish is a resident of the State of Washington. He is an  
17 Hereditary Chief of the Klickitat/Cascade Tribe, which is a confederated tribe within the  
18 Yakama Indian Nation. He is a direct descendant of Sla-kish, a signatory to the 1855  
19 Treaty with the Yakama.

20 A. Slockish, individually and as the representative of the Klickitat/Cascade  
21 Tribe, has been harmed by the damage to the historic and cultural resources  
22 in which it has an interest, including the Native American Traditional

1 Cultural Property located within the U.S. 26 highway widening project  
2 area.

3 B. Slockish, individually and as the representative of the Klickitat/Cascade  
4 Tribe, has been harmed by the breach of his and his Tribe's entitlement to  
5 be consulted regarding the U.S. 26 highway widening project.

6 5.

7 The Klickitat/Cascade Tribe is a confederated Tribe of the Yakama Indian Nation.  
8 The Klickitat/Cascade Tribe considers the Mount Hood area, including U.S. 26 highway  
9 widening project area, to be a Traditional Cultural Property.

10 A. The Klickitat/Cascade Tribe has been harmed by the damage to the historic  
11 and cultural resources in which it has an interest, including the Native  
12 American Traditional Cultural Property located within the Dwyer  
13 Memorial Forest and within the right-of-way of the U.S. 26 highway  
14 widening project.

15 B. The Klickitat/Cascade Tribe has been harmed by the breach of its  
16 entitlement to be consulted regarding the U.S. 26 highway widening  
17 project.

18 6.

19 Plaintiff Johnny Jackson is a resident of the State of Washington. He is a Chief of  
20 the Cascade Tribe.

21 A. Jackson, individually and as the representative of the Cascade Tribe, has  
22 been harmed by the damage to the historic and cultural resources in which

1 it has an interest, including the Native American Traditional Cultural  
2 Property located within the Dwyer Memorial Forest and within the right-  
3 of-way of the U.S. 26 highway widening project.

4 B. Jackson, individually and as the representative of the Klickitat/Cascade  
5 Tribe, has been harmed by the breach of his and his Tribe's entitlement to  
6 be consulted regarding the U.S. 26 highway widening project.

7 **7.**  
8

9 The Cascade Tribe considers the Mount Hood area, including the U.S. 26 highway  
10 widening project area, to be a Traditional Cultural Property.

11 A. The Cascade Tribe has been harmed by the damage to the historic and  
12 cultural resources in which it has an interest, including the Native  
13 American Traditional Cultural Property located within the Dwyer  
14 Memorial Forest and within the right-of-way of the U.S. 26 highway  
15 widening project.

16 B. The Cascade Tribe has been harmed by the breach of its entitlement to be  
17 consulted regarding the U.S. 26 highway widening project.

18 **8.**  
19

20 Plaintiff Carol Logan is a resident of Oregon, and is of Native American ancestry.

21 She is a member of the Mount Hood Sacred Land Preservation Alliance (hereinafter  
22 "MHSLPA"). She has since the 1980s engaged in advocacy to preserve and protect  
23 Native American sacred lands within the Mount Hood area, including the project area at  
24 issue in this dispute.



1 Defendant U.S. Department of Transportation , Federal Highway Administration  
2 (hereinafter "FHWA") is an agency of the United States government, and administers the  
3 Federal Aid Highway Program in Oregon authorized by 23 U.S.C. § 101 et. seq., including  
4 the U.S. 26: Wildwood-Wemme project. FHWA is the lead agency for the U.S. 26:  
5 Wildwood-Wemme project.

6 12.

7 Defendant Dirk Kempthorne is the U.S. Interior Secretary. He oversees the  
8 Defendant U.S. Department of the Interior, Bureau of Land Management.

9 13.

10 Defendant U.S. Department of Interior, Bureau of Land Management (hereinafter  
11 "BLM"), is an agency of the United States government. It owns the Wildwood Recreation  
12 Area in Clackamas County, including the Dwyer Memorial Forest, which is the northeast  
13 corner of the Wildwood Recreation area. The area of the Wildwood Recreation Area and  
14 Dwyer Memorial Forest located north of U.S. 26 lies partially within the project area of  
15 the U.S. 26 highway widening project.

16 14.

17 Defendant John Fowler is the Executive Director of the Advisory Council on  
18 Historic Preservation.

19 15.

20 Defendant Advisory Council on Historic Preservation (hereinafter "ACHP") is an  
21 agency of the United States government. It is charged with advising other federal agencies



1 as to the responsibilities and obligations of the latter under the National Historic  
2 Preservation Act (hereinafter "NHPA")

3 **16.**

4 Defendant Matthew Garrett is the Director of the Oregon Department of  
5 Transportation (hereinafter "ODOT"), which is the agent of Defendant FHWA for the  
6 Federal Aid Highway Program pursuant to 23 U.S.C. § 315. Defendant Garrett has served  
7 as ODOT's Director since December 19, 2005. Claims made against Garrett are under the  
8 *Ex Parte Younger* doctrine for his failure to comply with federal law.

9 **GENERAL ALLEGATIONS**

10 **17.**

11 Prior to European settlement, the area of Mount Hood was utilized by several  
12 Native American Indian groups, including Sahaptin language groups which include the  
13 Klickitat language. In the mid-19<sup>th</sup> Century, a series of treaties removed Native Americans  
14 from these areas to the Yakama (Washington), Grande Ronde and Warm Springs (Oregon)  
15 reservations. However, many of these Native Americans resisted removal to the  
16 reservations and continued to live along the Columbia River and surrounding areas,  
17 including the Cascade Mountains.

18 **18.**

19 The Native American history of the Mount Hood area includes complex  
20 migrations in search of food sources. A network of Indian Trails developed throughout  
21 the area. The Native Americans established villages, campsites, and burial grounds along  
22 these trails. European settlers took advantage of this existing network of trails. Pioneer

1 Samuel Barlow utilized such trails, one of which developed into the Barlow Road, the  
2 westernmost segment of the Oregon Trail. A number of remnant segments of the Barlow  
3 Road traverse the U.S. 26: Wildwood-Wemme project area. When first constructed, U.S.  
4 26, furthermore, roughly paralleled the route of the Indian Trail / Barlow Road.

5 **19.**

6 Defendant FHWA and its agent ODOT widened U.S. 26 from two to four lanes in  
7 the 1980s. That project included an Environmental Impact Statement (hereinafter "EIS")  
8 pursuant to the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. §  
9 4321 et seq. During the development of the EIS, archaeologist Richard Pettygrew  
10 identified an archaeological site as a potential Barlow Road stone toll booth. This artifact  
11 was, and remains, located with the U.S. 26 right-of-way owned by ODOT. It is within  
12 the project area for the current U.S. 26: Wildwood-Wemme project.

13 **20.**

14 During the 1980s highway widening project, a rock cluster was discovered  
15 adjacent to the project area. This rock cluster was located on land owned by Defendant  
16 BLM, in the corner of the Wildwood Recreation Area property that is north of U.S. 26;  
17 or alternatively, just within the U.S. 26 right-of-way owned by ODOT. This site is  
18 within the current project area for the U.S. 16 Wildwood-Wemme project. Pettygrew  
19 examined the rock cluster as a potential Pioneer or Native American gravesite, and found  
20 no human remains. Pettygrew had no Native Americans on his archaeological team, and  
21 the distribution list for his report included no Native Americans. Later, Yakama elder

1 Wilfred Yallup independently identified the rock cluster as a burial cairn identifying  
2 surrounding graves but not containing a specific grave underneath it.

3 21.

4 During the 1980s highway widening project, ODOT negotiated with Michael  
5 Jones, presently Curator of Plaintiff Cascade Geographic Society and then with Citizens  
6 for a Suitable Highway, an agreement for the protection of certain historic, cultural, and  
7 natural resources. These included, but were not limited to, the Barlow Road and the  
8 potential toll booth associated with it, the rock cluster later identified as a burial cairn, the  
9 Dwyer Memorial Forest, and the Mountain Air Park Pillars, all of which were in fact  
10 preserved, and were later to be within the project area of the current U.S. 26: Wildwood-  
11 Wemme highway widening project.

12 22.

13 Throughout the 1980s, 1990s, and 2000s, various elders of the Yakama Indian  
14 Nation, including, but not limited to, Wilfred Yallup, Leo Aleck, and Plaintiffs Slockish  
15 and Jackson, expressed their interest in the Mount Hood area, including the project area  
16 of the current U.S. 26: Wildwood-Wemme project, as a Traditional Cultural Property.

17 23.

18 In 1998, citizens petitioned ODOT to widen U.S. 26 again in the area of the  
19 current U.S. 26: Wildwood-Wemme project. Citizens expressed concerns for safety  
20 because this stretch of highway did not include a center refuge lane for turns. The project  
21 area, approximately 13 miles of Sandy, Oregon, is located in Township 2 South, Range 7  
22 East, Sections 30, 31, and 32, Clackamas County. It includes the stretch of highway

1 adjacent to Mount Hood Village, the Mountain Air Park subdivision, and the Wildwood  
2 Recreation Area.

3 **24.**

4 In 2001, the Oregon State Historic Preservation Officer, and Defendants ACHP,  
5 ODOT, and FHWA signed a Programmatic Agreement (hereinafter "PMOA") Regarding  
6 the Implementation of Minor Transportation Projects. This PMOA provides a  
7 streamlined process for the parties to address their obligations under section 106 of the  
8 National Historic Preservation Act (hereinafter "NHPA"), 16 U.S.C. §§ 470(f) and 470w-  
9 4; 36 C.F.R. Part 800. The PMOA lists specific tribes that shall be consulted. These  
10 tribes are only Oregon tribes; the PMOA does not include the Yakama Indian Nation, nor  
11 any of its confederated tribes such as Plaintiff Klickitat/Cascade Tribe, or the Cascade  
12 Tribe.

13 **25.**

14 Defendant FHWA and its agent ODOT undertook planning for the U.S. 26  
15 Wildwood-Wemme project, and in August of 2006 issued its draft Environmental  
16 Assessment (hereinafter "draft EA" pursuant to NEPA. The project's Key Number is  
17 12840. FHWA and ODOT selected as the "preferred alternative" the "widen to the north"  
18 alternative. This alternative would add fourteen (14) feet of paving on the north side of  
19 U.S. 26, in order to provide an equal amount of space for a center refuge turn lane in the  
20 middle of the highway. This alternative would destroy the rock cluster that Yakama elder  
21 Wilfred Yallup had identified as a burial cairn, because this resource was so close to the

1 pavement of U.S. 26 to begin with. It would also involve substantial grading, earth  
2 moving, and tree removal in the area Plaintiffs identify as a Traditional Cultural Property.

3 26.

4 The draft EA included a June 10, 2005 archaeological report by archaeologist  
5 Patrick O'Grady. This report was not disclosed to the public. The report makes no  
6 reference to the potential Barlow Road stone toll booth previously identified by Richard  
7 Pettygrew in 1985. O'Grady failed to locate the rock cluster that had been examined by  
8 Pettygrew in 1986 and later identified by Yakama elder Wilfred Yallup as a burial cairn.  
9 Neither O'Grady, FHWA, nor ODOT provided the report to either the Yakama Indian  
10 Nation, Plaintiff Slockish, Plaintiff Jackson, or Plaintiff Logan; nor consulted any of these  
11 parties for their input as to the significance of the rock cluster.

12 27.

13 As part of the EA process, neither Defendant FHWA or its agent ODOT  
14 consulted with Plaintiff Klickitat/Cascade Tribe, Plaintiff Slockish, Plaintiff Cascade  
15 Tribe, or Plaintiff Jackson, pursuant to Section 101(d)(6)(B) of the NHPA, 16 U.S.C.  
16 470a(d)(6)(B); and 36 CFR § 800.2(c)(2)(ii), regarding the Traditional Cultural Properties  
17 within the project area.

18 28.

19 After public hearings and public comment, FHWA and ODOT issued a Revised  
20 Environmental Assessment (hereinafter "REA") and Finding of No Significant Impact for  
21 the project on February 8, 2007.

22 29.

1 On February 15, 2008, Plaintiffs Carol Logan and CGS, through its Curator,  
2 Michael P. Jones, sent memoranda to Defendant FHWA relating that the rock monument  
3 identified as a burial cairn had recently been vandalized, and the rocks carried off.  
4 Plaintiffs Logan and CGS also requested a new review of the U.S. 26: Wildwood-Wemme  
5 project under section 106 of the NHPA. Defendant FHWA responded on February 26,  
6 2008 that the Section 106 review prepared with the EA was satisfactory.

7 **30.**

8 Also in February of 2008, Plaintiffs Logan and CGS requested that Defendant  
9 ACHP advise Defendant FHWA that an adequate Section 106 review was necessary for  
10 the U.S. 26: Wildwood-Wemme project. On April 14, 2008, Defendant ACHP advised  
11 Defendant FHWA that because project construction had already commenced, and because  
12 no "federally recognized" Indian tribes had come forward to express concerns, no further  
13 action was necessary.

14 **31.**

15 On February 28, 2008, Defendant BLM, pursuant to 43 U.S.C. § 1732, issued a  
16 permit for tree removal to ODOT in the project area of the U.S. 26: Wildwood to Wemme  
17 project. In late March of 2008, contractors for Defendant FHWA and ODOT began  
18 cutting trees, including old growth Douglas Fir that comprised the Dwyer Memorial  
19 Forest, within the project area. This operation was substantially complete by the end of  
20 that month. The permit constituted a federal undertaking under NHPA for which Section  
21 106 review was necessary, because the project area constitutes a Traditional Cultural

1 Property of the Native American Plaintiffs in this case. No such review or consultation  
2 with the Native American Plaintiffs took place prior to the undertaking.

3 **32.**

4 On April 8, 2008, Defendant FHWA, pursuant to 23 U.S.C § 139(l)(1), published  
5 its Notice of Final Agency Actions on U.S. 26, Wildwood to Wemme: Clackamas  
6 County, OR. The Notice appears on pp. 19134-35, Vol. 73, No. 68.

7 **33.**

8 At some point unknown to Plaintiffs, FHWA and ODOT determined after issuing  
9 the REA that they would have to secure additional right-of-way from Defendant BLM on  
10 the north side of U.S. 26. The grant of the right-of-way means that the U.S. 26:  
11 Wildwood-Wemme project no longer falls within the 2001 PMOA for minor  
12 transportation projects, but instead requires full Section 106 review and a separate  
13 memorandum of agreement. Defendant BLM issued a Letter of Consent to grant the right-  
14 of-way to Defendant FHWA on April 2, 2008. It is unknown to Plaintiffs at this time  
15 whether the right-of-way has actually been granted. The grant of the right-of-way itself  
16 constitutes a second, separate federal undertaking under NHPA for which BLM must  
17 undertake Section 106 review, because the project area constitutes a Traditional Cultural  
18 Property of the Native American Plaintiffs in this case. No such review or consultation  
19 with the Native American Plaintiffs has taken place.

20 **34.**

21 On April 23, 2008, Plaintiff Slockish sent a memo to ODOT, Defendant FHWA,  
22 and Defendant ACHP regarding the status of the Dwyer Memorial Forest as a Traditional

1 Cultural Property to him and his people, and the fact that the project area contained  
2 burial grounds. On April 25, 2008, Plaintiff Jackson sent out a similar memo to the same  
3 Parties.

4 **35.**

5 The Defendants in this case are required to make decisions that are not arbitrary,  
6 capricious, an abuse of discretion, or otherwise not in accordance with law.

7 **36.**

8 On June 20, 2008, Plaintiff CGS filed a Notice of Intent to Appeal in the Oregon  
9 Land Use Board of Appeals (hereinafter, "LUBA"), case no. 2008-091. Plaintiff CGS  
10 appealed the denial by Clackamas County of CGS's code enforcement request against  
11 ODOT for the latter's failure to seek review of the U.S. 26: Wildwood-Wemme project by  
12 the Clackamas County Historic Review Board for the project's impacts on the Barlow  
13 Trail. LUBA dismissed the case on August 20, 2008. CGS did not appeal the dismissal.

14 **37.**

15 On June 20, 2008, Plaintiff CGS filed a Notice of Intent to Appeal with LUBA,  
16 case no. 2008-092. Plaintiff CGS appealed the failure of the Oregon Department of  
17 Environmental Quality to comply with Oregon's land use statute in permitting ODOT to  
18 undertake clearance, grading, and construction activities pursuant to an NPDES 1200-CA  
19 erosion and sediment control permit. This permit covers the U.S. 26: Wildwood-Wemme  
20 project. LUBA dismissed this appeal on August 20, 2008. CGS appealed LUBA's final  
21 opinion and order to the Oregon Court of Appeals on September 10, 2008. The case is  
22 currently pending.



1 38.

2 On July 7, 2008, Plaintiffs Slockish, Jackson and Logan filed a Notice of Intent to  
3 Appeal with LUBA, case no. 2008-101. These Plaintiffs appealed ODOT's U.S. 26:  
4 Wildwood-Wemme project due to ODOT's failure to comply with Oregon's land use  
5 statutes. The appeal is currently pending before LUBA.

6 **FIRST CLAIM FOR RELIEF: DEFENDANTS PETERS, FHWA AND GARRETT**  
7 **VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT IN FAILING TO**  
8 **CONSULT WITH THE NATIVE AMERICAN PLAINTIFF TRIBES REGARDING**  
9 **THE TRADITIONAL CULTURAL PROPERTIES WITHIN THE U.S. 26:**  
10 **WILDWOOD-WEMME PROJECT AREA.**

11  
12 39.

13 Plaintiffs reallege ¶¶ 1-38.

14 40.

15 Defendants Peters, FHWA and Garrett were required to consult with Plaintiffs  
16 Klickitat/Cascade Tribe and Cascade Tribe to identify Traditional Cultural Properties  
17 within the U.S. 26: Wildwood-Wemme project area prior to commencing the project. 16  
18 U.S.C. 470a(d)(6)(B); and 36 CFR § 800.2(c)(2)(ii) They violated these provisions in  
19 failing to do so.

20 41.

21 Defendants Peters, FHWA and Garrett were required to take into account the  
22 effects on these Traditional Cultural Properties of the U.S. 26: Wildwood-Wemme project  
23 prior to commencing the project. 16 U.S.C. 470f; and 36 CFR Part 800. They violated  
24 these provisions in failing to do so.

**SECOND CLAIM FOR RELIEF: DEFENDANTS PETERS, FHWA AND GARRETT VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT IN FAILING TO ENSURE THAT ITS ARCHAEOLOGIST PATRICK O'GRADY MET THE PROFESSIONAL STANDARD OF ARCHAEOLOGISTS IN LOCATING, IDENTIFYING, AND EVALUATING THE NATIVE AMERICAN BURIAL CAIRN WITHIN THE U.S. 26: WILDWOOD-WEMME PROJECT AREA.**

42.

Plaintiffs reallege ¶¶ 1-38.

43.

As part of their failure to identify Traditional Cultural Properties within the U.S. 26: Wildwood-Wemme project area, Defendants Peters, FHWA and Garrett failed to ensure that their agent, archaeologist Patrick O'Grady, met professional standards. 16 U.S.C. § 470h-4. 36 CFR § 800.2(a)(1). As part of his archaeological report for the project's Environmental Assessment O'Grady failed to locate the burial cairn within the project area. Because of this failure, he further failed to consult with the Native American Plaintiffs in this case to properly identify the resource. This failure, in turn, resulted in the failure of Defendant's Peters, FHWA and Garrett to properly protect the resource, and it was subsequently destroyed by vandalism.

**THIRD CLAIM FOR RELIEF: DEFENDANTS PETERS, FHWA AND GARRETT VIOLATED THE NATIONAL HISTORIC PRESERVATION ACT IN FAILING TO ADEQUATELY TAKE INTO ACCOUNT THE EFFECTS OF THE U.S. 26: WILDWOOD WEMME PROJECT ON THE POTENTIAL STONE TOLL BOOTH IDENTIFIED BY RICHARD PETTYGREW IN 1985.**

44.

Plaintiffs reallege ¶¶ 1-38.

45.

Compliance with Section 106 of the NHPA requires an agency to adequately identify historic properties. 36 CFR § 800.4. Defendants Peters, FHWA and Garrett failed to undertake a sufficiently intensive-level archaeological investigation of the potential stone toll booth first identified by Richard Pettygrew in 1985. Defendants Peters, FHWA and Garrett therefore failed to determine whether this resource is eligible for the National Register of Historic Places, and failed to take into account the effects on this resource of the U.S. 26: Wildwood-Wemme project pursuant to NHPA Section 106.

**FOURTH CLAIM FOR RELIEF: DEFENDANTS FOWLER ACHP FAILED TO ADEQUATELY ADVISE DEFENDANTS PETERS, FHWA AND GARRETT ON THEIR RESPONSIBILITIES UNDER THE NHPA.**

46.

Plaintiffs reallege ¶¶ 1-38.

47.

Defendants Fowler and ACHP have a duty to advise Federal and State agencies on matters relating to historic preservation. 16 U.S.C. §§ 470l-j. It is part of the consultation process under Section 106 of the NHPA. 16 U.S.C. § 470f; 36 CFR Part 800. Defendants Fowler and the ACHP failed to properly advise Defendants Peters, FHWA and Garrett on the necessity to determine whether the U.S. 26: Wildwood-Wemme project area is a Traditional Cultural Property, in consultation with the Native American Plaintiffs. It erred in asserting that such consultation was not required because no "federally-recognized" tribes had expressed concerns about the project. It failed to adequately inform itself of the project details. It failed to advise Defendants Peters, FHWA and Garrett that the necessity to seek additional right-of-way from Defendant BLM meant that the project

1 is not a "minor transportation project" covered by the 2001 PMOA, and that instead a  
2 full Section 106 review, with a separate, project-specific Memorandum of Agreement was  
3 required for the project pursuant to 36 CFR, Part 800.

4 **FIFTH CLAIM FOR RELIEF: DEFENDANTS KEMPThORNE AND BLM FAILED**  
5 **TO COMPLY WITH THE NHPA IN ISSUING A PERMIT TO CUT TREES TO**  
6 **ODOT AND TO DEFENDANT FHWA.**

7  
8 48.

9  
10 Plaintiffs reallege ¶¶ 1-38.

11  
12 49.

13  
14 The tree cutting permit issued by Defendants Kempthorne and BLM is a federal  
15 undertaking pursuant to 16 U.S.C. 470w(7)(C). Defendants Kempthorne and BLM were  
16 required to undertake Section 106 review for this undertaking. They failed to do so. As  
17 par of the undertaking, Defendants Kempthorne and BLM were required to consult with  
18 Plaintiffs Klickitat/Cascade Tribe and Cascade Tribe to identify the project area as a  
19 Traditional Cultural Property and take into account the effects of the U.S. 26: Wildwood-  
20 Wemme project pursuant to 16 U.S.C. 470a(d)(6)(B) and 36 CFR § 800.2(c)(2)(ii). They  
21 failed to do so.

22 **SIXTH CLAIM FOR RELIEF: DEFENDANTS KEMPThORNE AND BLM HAVE**  
23 **FAILED TO COMPLY WITH THE NHPA IN APPROVING A GRANT OF RIGHT-**  
24 **OF-WAY TO ODOT AND TO DEFENDANTS PETERS AND FHWA.**

25  
26 50.

27  
28 Plaintiffs reallege ¶¶ 1-38.

29  
30 51.

1 The grant of a right-of-way by Defendants Kempthorne and BLM is a federal  
 2 undertaking pursuant to 16 U.S.C. 470w(7)(C). Defendants Kempthorne and BLM were  
 3 required to undertake Section 106 review for this undertaking. They failed to do so. As  
 4 part of the undertaking, Defendants Kempthorne and BLM were required to consult with  
 5 Plaintiffs Klickitat/Cascade Tribe and Cascade Tribe to identify the project area as a  
 6 Traditional Cultural Property and take into account the effects of the U.S. 26: Wildwood-  
 7 Wemme project pursuant to 16 U.S.C. 470a(d)(6)(B) and 36 CFR § 800.2(c)(2)(ii). They  
 8 failed to do so.

9 **SEVENTH CLAIM FOR RELIEF: DEFENDANTS IN THIS CASE, IN VIOLATING**  
 10 **THE NHPA, ACTED IN A MANNER THAT WAS ARBITRARY AND**  
 11 **CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN**  
 12 **ACCORDANCE WITH LAW**

13  
 14 52.

15  
 16 Plaintiffs reallege ¶¶ 1-38.  
 17

18 53.

19 In failing to comply with the NHPA, the Defendants in this case acted in a manner  
 20 that was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance  
 21 with law. 5 U.S.C. § 706(2)(A).

22 **EIGHTH CLAIM FOR RELIEF: THE FEDERAL DEFENDANTS BREACHED**  
 23 **THEIR RESPECTIVE FIDUCIARY RESPONSIBILITIES TOWARDS PLAINTIFFS**  
 24 **KLICKITAT/CASCADE TRIBE AND CASCADE TRIBE IN VIOLATING THE**  
 25 **NATIONAL HISTORIC PRESERVATION ACT.**

26  
 27 54.

28  
 29 Plaintiffs reallege ¶¶ 1-38.  
 30

55.

The Federal Defendants in this case owe a fiduciary obligation to all Indian Tribes as a class. *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 788 (9<sup>th</sup> Cir. 2006). Violations of NHPA constitute a breach of this fiduciary obligation. *Id.* In violating NHPA, the Federal Defendants breached their fiduciary obligations to the Klickitat/Cascade Tribe and Cascade Tribe.

**NINTH CLAIM FOR RELIEF: IN VIOLATING THE NHPA, THE DEFENDANTS VIOLATED THE DUE PROCESS RIGHTS OF PLAINTIFFS SLOCKISH, JACKSON, AND LOGAN.**

56.

Plaintiffs reallege ¶¶ 1-38.

57.

In violating the NHPA, the Defendants have violated the due process rights guaranteed to Plaintiffs Slockish, Jackson, and Logan under the Fifth and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, Plaintiffs pray for the following relief:

(1) An order declaring that the Defendants have violated the National Historic Preservation Act, and in so doing:

- a. The Federal Defendants have breached their respective fiduciary obligations to the Klickitat/Cascade Tribe and the Cascade Tribe; and
- b. All of the Defendant's have violated the due process rights of Plaintiffs Slockish, Jackson, and Logan.

- 1           (2) An order for preliminary injunction prohibiting Defendants  
2           Kempthorne and BLM from granting a right-of-way to ODOT and  
3           Defendants Peters and FHWA -- if this has not yet occurred -- until  
4           the former comply with their obligations under the NHPA.  
5
- 6           (3) An order for a permanent injunction for the relief requested in  
7           paragraph (2) above, as well as for:  
8

  - 9               a. The requirement that Defendants consult with the Plaintiffs  
10              regarding the Native American Traditional Cultural Property  
11              within the U.S. 26: Wildwood-Wemme project area.  
12
  - 13              b. The requirement that Defendants comply with Section 106 of  
14              the NHPA and 36 CFR Part 800, and memorialize this  
15              compliance with a Memorandum Agreement among themselves  
16              and with Plaintiffs.  
17
  - 18              c. The requirement that the Defendants undertake appropriate  
19              remedial measures to address appropriately the damage to the  
20              Native American Traditional Cultural Property located within  
21              the U.S. 26: Wildwood-Wemme project area.  
22
  - 23              d. The requirement that the Defendants Peters, FHWA and  
24              Garrett undertake an archaeological survey on the resource  
25              identified by Pettygrew in 1985 to determine if in fact it is a  
26              toll booth associated with the Barlow Road.  
27
- 28           (4) An order assessing actual and punitive damages against the Federal  
29           Defendants for their breach of their fiduciary obligations to the  
30           Klickitat/Cascade Tribe and the Cascade Tribe.  
31
- 32           (5) An order assessing actual and punitive damages against the Defendants  
33           for violations of the due process rights of Plaintiffs Slockish, Jackson,  
34           and Logan.  
35
- 36           (6) An order awarding Plaintiffs their reasonable costs, fees and expense in  
37           this action, including reasonable attorney fees, pursuant to 16 U.S.C. §  
38           470w-4 and 42 U.S.C. § 1988.  
39
- 40           (7) An order imposing all other and further relief as to which Plaintiffs  
41           may be entitled and which the Court may deem just and equitable.  
42  
43

1 DATED October 6, 2008

2  
3 Respectfully Submitted,

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5  
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